No. 26649 - State of West Virginia v. Banner Cornel Catlett

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Starcher, J., dissenting:

The majority opinion holds -- incorrectly, I believe -- that a "curative" instruction adequately dealt with the fact that the state's expert witness on the sole issue of the defendant's "sanity" volunteered *four times* to the jury that there was other significant evidence that "he couldn't talk about" -- evidence that allegedly supported the expert's conclusion that the defendant was not suffering from a brain disorder.

(This same expert did not interview the defendant before his murder trial. But he did interview the same defendant before the same defendant's earlier arson trial, a trial in which this expert's opinion was *not* credited by the jury. In his earlier arson trial, not many months before his murder trial, this same defendant was found "not guilty by reason of insanity.")

In the instant case, the expert's repeated volunteering to the jury that *there was other important and probative evidence that the Court had prohibited the jury from hearing* suggests that the expert had yielded to a common temptation, and was engaging in impermissible witness advocacy.

A verdict based on such testimony -- about a defendant whom two trained medical professionals and a previous jury had found to have a serious brain disorder -- is simply not sustainable.

This may have been a terrible miscarriage of justice. A new trial should be awarded. Accordingly, I dissent.